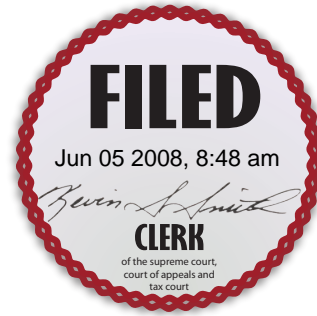


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

GREG GREEN,

Appellant-Respondent,

vs.

JENNY J. GREEN,

Appellee-Petitioner.

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No. 40A01-0707-CV-313

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Chris D. Monroe, Special Judge
Cause No. 40C01-0411-DR-68

June 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Greg Green appeals the trial court's distribution of marital assets upon the dissolution of his marriage to Jenny Green. Greg raises three issues for our review, which we consolidate and restate as follows:

1. Whether the trial court's division of the marital assets was clearly erroneous.
2. Whether the trial court's award of attorney's fees to Jenny was clearly erroneous.

We affirm in part and reverse and remand in part.

FACTS AND PROCEDURAL HISTORY

Greg and Jenny were married on February 19, 1994. During their marriage, they had one child, Logan, who was born on April 10, 1996, and was severely disabled by Batten's Disease. On November 15, 2004, Jenny filed a petition for dissolution of marriage. During the dissolution proceedings, Logan was wheelchair-bound and had to be fed and medicated through a feeding tube. On August 18, 2006, the court held a custody hearing, after which the court awarded custody of Logan to Jenny, his primary caregiver. And on September 1, 2006, the court held an initial hearing on the distribution of the marital estate. Four days later, while in the care of Greg, Logan died due to complications from his disease.

On September 1, 2006, and October 27, 2006, the court held hearings to determine the distribution of the marital assets and payments for provisional maintenance. On June

11, 2007, the court entered its decree of dissolution of marriage and distribution of marital assets (“Decree”). In its Decree, the court stated as follows, in relevant part:

**Findings of Fact
As to Rehabilitative Maintenance**

13. The Court finds that Jenny left a lucrative position with an established company in order to enter her marriage with Greg. Jenny was making \$45,000 per year with an assigned company vehicle in 1994. Jenny suffered an interruption in her employment as a result of homemaking responsibilities.

14. The Court finds that Jenny sold her Kentucky home and used the proceeds of the sale to improve the couple’s Jennings County home.

15. The Court finds that Jenny was a stay at home Mother with the additional responsibilities of a profoundly ill child and a husband that worked many extra hours during most of the years of the marriage. Jenny suffered an interruption in her employment as a result of her responsibilities of caring for a very ill child.

16. The Court finds that Greg, a registered pharmacist, has a current earning potential of at least \$45.00 per hour . . . or \$1,800 per week, plus income from the farm operation. The Court finds that Jenny has a current earning potential of \$10.00 per hour . . . or \$400.00 per week. Jenny has suffered an extended absence from the job market, requiring additional training and employment skills in order to return to her previous level of employment.

17. The Court finds that Jenny will require eighteen (18) months for employment rehabilitation from September 5, 2006.

18. The Court orders Greg contribute \$150 per week rehabilitative maintenance to Jenny for a period of eighteen (18) months, to allow Jenny to return to the level of employment she enjoyed prior to marriage and motherhood.

19. The Court finds that Greg has not been consistent in child support and maintenance payments. The Court finds the Father was \$2,288.00 in arrears on September 5, 2006[,] [the date of Logan’s death]. The child support arrearage shall be included in the marital estate equalization.

20. The rehabilitative maintenance of \$11,700 shall be included in the marital estate equalization.

**Findings of Fact
As to Marital Estate**

21. Both parties filed pre-trial submissions regarding the marital estate, including descriptions of the real property and how title was held, valuations of real property, descriptions of personal property and agreed values of personal property.

22. Both parties submitted pre-trial recommendations for distribution of real and personal property.

23. The Court heard extensive evidence concerning real and personal property and concerning proposals for distribution.

24. The Court finds that the gross marital estate shall be divided on a 50/50 basis.

25. The Court finds that the distribution of the marital assets and values shall be in accordance with the Marital Estate Distribution, attached and included as Exhibit A.

26. The Court orders a property equalization judgment payment of \$443,777.75 be made to Jenny from Greg within sixty (60) days of this order. The equalization payment is a lien against the real estate of the parties, the deed of which real estate is attached as Exhibit B.

* * *

30. The Court finds that Greg shall pay 70% of Jenny's attorney fees and expenses, because of the disparity in income during the duration of this action. . . . Greg shall pay \$15,318.86 through October 25, 2006 (representing 70% . . .).

(a) The Court has previously awarded Jenny attorney fees because of Greg's contemptuous behavior.

(b) The Court finds that Jenny had little or no liquid assets with respect to the marital property that she was awarded during the provisional period or with regard to the assets she is awarded by this Order.

(c) The Court finds that Jenny has little or no liquid assets from her separate property.

(d) The award of attorney fees and costs affords Jenny access to an attorney under circumstances in which she would not otherwise be able to afford an attorney.

* * *

(f) The Court has considered the financial resources, assets, income and economic conditions of each party. The Court finds the award of attorney fees and expenses to be reasonable under the circumstances of this case.

* * *

33. The Court finds there is no credible evidence of an outstanding loan to the marriage from Greg's parents.

34. The Court finds there is evidence of an outstanding bill from Lawyer Excavation, Inc. in the amount of \$25,000.00.

* * *

**Conclusions of Law
As to Marital Estate
and Attorney Fee Allocation**

* * *

There was testimony leading to the exclusion of portions of the marital assets (i.e., airplane) from the marital estate. The presumption of equal division was not rebutted. The marital estate is to be divided on a 50/50 basis, with an equalization payment.

* * *

The Court has looked, in addition to the factors cited in Indiana Code [Section] 31-15-10-1, at the responsibility of each party and has found that the behaviors of the Respondent have greatly increased his responsibility for attorney fees.

Appellant's App. at 272-75.

In its attached Exhibit A, the trial court found that Greg and Jenny had total marital assets of \$863,039.69. The court awarded \$853,048.30 to Greg with an "equalization payment" from Greg to Jenny in the amount of \$427,024.15. Id. at 281

(capitalization removed). And the court awarded Jenny attorney's fees in the amount of \$20,050.95, which it calculated as ninety-two percent of her total fee. This appeal ensued.

DISCUSSION AND DECISION

Standard of Review

Greg asserts that the trial court erred in its valuation and distribution of marital assets and liabilities pertaining to the farm, in not addressing Jenny's 401(k) account, and in awarding Jenny attorney's fees. "[W]here[,] as here, the trial court enters special findings and conclusions pursuant to Indiana Trial Rule 52(A), . . . [t]he trial court's findings and conclusions will be set aside only if they are clearly erroneous." Stonger v. Sorrell, 776 N.E.2d 353, 358 (Ind. 2002). A judgment is clearly erroneous if the evidence does not support the trial court's findings or if those findings do not support the judgment. See id. We do not reweigh the evidence; rather we consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment. Yoon v. Yoon, 711 N.E.2d 1265, 1268 (Ind. 1999).

Issue One: Division of Marital Assets

Farm Property and Debts

Greg first maintains that the value of the farm property at the time of the marriage should be set over to him and that only the increase in value during the marriage should

be divided equally with Jenny.¹ That is, Greg contends that he owned the farm property before the marriage, and, therefore, that Jenny is entitled to only half of the increase in equity during the marriage.² Doing this, Greg continues, would provide for a more just and reasonable division of the marital farm property than “simply add[ing] up the assets and divid[ing] the total in two.” Appellant’s Brief at 15. We cannot agree.

It is true that,

where assets were acquired prior to marriage, the trial court may achieve a just and reasonable property division by determining the appreciation over the course of the marriage of such assets and dividing the appreciation between the spouses, while setting over to the appropriate spouse the pre-marriage value of the assets at issue.

Doyle v. Doyle, 756 N.E.2d 576, 579 (Ind. Ct. App. 2001) (citing Newby v. Newby, 734 N.E.2d 663, 669 (Ind. Ct. App. 2000)) (emphasis added). However, that approach is not mandated, and we review the court’s decision with deference. See Smith v. Smith, 854 N.E.2d 1, 6 (Ind. Ct. App. 2006) (“we will reverse a property distribution only if there is no rational basis for the award.”) (citations omitted).

¹ Had Greg asserted simply that the trial court erred in dividing the marital property equally, that argument would have been waived as invited error since he specifically requested a fifty-fifty division. See, e.g., Wright v. State, 828 N.E.2d 904, 907 (Ind. 2005).

² Insofar as Greg disputes the trial court’s reliance on Jenny’s appraised value of the farm over his appraised value, Greg’s position is simply a request for this court to reweigh the evidence, which we will not do. See Yoon, 711 N.E.2d at 1268. And to the extent that Greg asserts that the trial court clearly erred by relying on Jenny’s evidence of the farm’s value because Jenny’s evidence was gathered in December of 2005, that position is not well-taken. “[O]ur supreme court has made it clear that the trial court has discretion to value the marital assets at any date between the date of filing the dissolution petition and the date of the hearing.” Bertholet v. Bertholet, 725 N.E.2d 487, 497 (Ind. Ct. App. 2000) (citing Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996)). As Jenny’s valuation occurred between those two dates, the trial court did not err in relying on that evidence.

Here, the trial court's decision is not without a rational basis. Greg owned the farm for only five years before he married Jenny, and their marriage lasted ten years. Thus, at the time of the dissolution, Jenny had contributed to the value of the farm for two-thirds of Greg's overall possession of the farm. Indeed, seven years into the marriage, Greg conveyed the farm to himself and Jenny as joint tenants by the entirety. Greg's position on appeal is simply a request for this court to reweigh the evidence in his favor and to substitute our judgment for the trial court's judgment. We will not do so. See Yoon, 711 N.E.2d at 1268; Smith, 854 N.E.2d at 6.

Greg also³ complains that the trial court did not properly give him "credit" for "contributions" he made for paying farm-related bills. Appellant's Brief at 15. Specifically, Greg asserts that the trial court erred in not crediting to him \$25,000 owed to Lawyer Excavating, Inc., \$11,369 purportedly owed to Sondgeroth Fencing, \$10,273 allegedly owed to Joe Kleber, and \$7,652 Greg contends was owed to Eaton's Feed Mill. We address each purported debt in turn.

The trial court expressly found that "there is evidence of an outstanding bill from Lawyer Excavation, Inc. in the amount of \$25,000.00." Appellant's App. at 274. However, in distributing the marital debt in its Exhibit A, the court did not incorporate

³ We decline to review Greg's additional position that the trial court somehow erred by not "allow[ing] him to retain some of the assets he brought into the marriage." See Appellant's Brief at 16. The trial court awarded Greg assets totaling almost 99% of the total value of the marital estate; his assertion that that was in any way insufficient is without merit. And to the extent Greg asserts error in the trial court's assessment or distribution of "farm rent values" and "personal property values," id. at 44, those arguments are without cogent reasoning and are therefore waived, see Ind. Appellate Rule 46(A)(8)(a).

that debt. As such, Greg contends that the court clearly erred. Jenny responds that “the mere fact that the court found that there was evidence presented concerning an outstanding bill . . . does not compel the conclusion that the court must find that this claimed debt should be set off against the value of the marital estate.” Appellee’s Brief at 31. But the court’s finding does not support its judgment; having found the existence of a valid debt, the court should have either included the debt in the marital estate or explained why it did not find the debt relevant to the distribution of the marital estate. Having done neither, the court appears to have simply missed the debt in its distribution of the marital estate. Accordingly, we remand this issue to the trial court for clarification.

As for the other three purported debts—to Sondgeroth Fencing, Joe Kleber, and Eaton’s Feed Mill—Jenny contested the existence and validity of each of those debts during the hearings before the trial court. The trial court did not mention those purported debts in its findings of fact. Thus, the evidence most favorable to the trial court’s judgment dictates that Greg failed to prove the existence of those debts. Greg’s position to the contrary on appeal is a request for this court to reweigh the evidence, which we will not do. See Yoon, 711 N.E.2d at 1268.

Jenny’s 401(k) Account

Greg next asserts that the court erred in not including Jenny’s 401(k) account in the marital estate. The value of Jenny’s 401(k) account when she married Greg was \$21,936.13. At the time of dissolution, the account had appreciated \$44,735.13, for a

total value of \$66,671.26. At trial, Jenny specifically requested that the court distribute the total value of her 401(k) account to her. However, the trial court did not mention Jenny's 401(k) account in its Decree.

On appeal, Greg maintains that Jenny's 401(k) account should not be included in the marital estate "but that the appreciation in its value during the marriage be assigned to Jenny as an asset." Appellant's Brief at 17. The 401(k) account is a marital asset and must be included in the marital estate. But the question remains how that asset should be divided. The parties do not dispute the existence of this asset or its value, and both sides agree that at least some part of Jenny's 401(k) should be distributed to her. We remand this issue to the trial court to include Jenny's 401(k) account in the marital estate, to determine what part, if any, of that account should be distributed to Jenny without an equalization payment from Greg, and to distribute the remaining part of that asset between Jenny and Greg accordingly.

Issue Two: Attorney's Fees

In its order, the trial court ordered Greg to pay seventy percent of Jenny's attorney's fees.⁴ However, when the court calculated the dollar amount Greg was to pay in its Exhibit A, the court calculated that Greg owed Jenny ninety-two percent of her attorney's fees. Hence, the trial court's findings and judgment on this issue are inconsistent, and we remand this issue to the trial court for clarification.

⁴ Greg does not appeal the trial court's finding that he owes Jenny 70% of her attorney's fees.

Conclusion

In sum, the trial court expressly found evidence of \$25,000 in debt owed to Lawyers Excavating, Inc., and it also expressly found that Greg owed Jenny seventy percent of her attorney's fees. Further, neither of the parties disputed the existence or value of Jenny's 401(k) account. However, the debt to Lawyer's Excavating, Jenny's 401(k) account, and Greg's payment of Jenny's attorney's fees are not incorporated into the trial court's Exhibit A, in which the court valued and distributed the marital assets. Accordingly, we reverse the trial court's judgment pertaining only to those three issues and remand to the trial court for clarification. In all other respects, we affirm the judgment of the trial court.

Affirmed in part, reversed and remanded in part.

DARDEN, J., and BROWN, J., concur.